

FILED

MAY 22 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY LEWIS JONES, JR., aka Seal A,

Defendant - Appellant.

No. 05-50370

D.C. No. CR-03-01278-SVW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted May 15, 2006^{**}

Before: B. FLETCHER, TROTT, and CALLAHAN, Circuit Judges.

Jerry Lewis Jones, Jr. appeals from the 120-month sentence imposed following his guilty-plea conviction for one count of distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii).

The government contends that Jones waived his right to appeal his sentence

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in his plea agreement. His appeal waiver, however, was conditioned upon, *inter alia*, the court determining that the total offense level was 29 or below. Because the district court did not articulate findings regarding the applicable offense level, this condition was not met, the waiver is not binding, and we have jurisdiction to review Jones' sentence under 28 U.S.C. § 1291.

Jones contends that, under the advisory guidelines, the district court could have applied the safety-valve provision though Jones did not meet all the criteria in 18 U.S.C. § 3553(f) because he had three criminal history points. Specifically, he contends that the district court had the discretion to reduce his criminal history points from three to one so that he would qualify for the safety valve. We disagree. Even after *United States v. Booker*, 543 U.S. 220 (2005), the district court must calculate sentencing factors using the United States Sentencing Guidelines. *See United States v. Cantrell*, 433 F.3d 1269, 1279-80 (9th Cir. 2006).

Because Jones admittedly had more than one criminal history point, he was not eligible for application of the safety valve. We therefore conclude that the district court correctly imposed the applicable statutory mandatory minimum sentence.

AFFIRMED.